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THE PROPOSED INTERNATIONAL CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS: THE AFRICAN PERSPECTIVES

A note by the ECA Secretariat

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I. INTRODUCTION

1. In recent years the international community, and especially the United Nations family of organizations, has developed an increasing awareness of the potentials as well as the dangers arising from the policies, activities and impacts of transnational corporations (TNCs) on the development processes and on international relations. As result, the United Nations has initiated concrete measures aimed at the formulation of codes of conduct to regulate the activities of these corporations. Thus, following the Report of the Group of Eminent Persons appointed by the Secretary-General of the United Nations in 1972 to study the impact of TNCs on world development and international relations, 1/ the United Nations Economic and Social Council (ECOSOC) set up, in 1974, a Commission on Transnational Corporations 2/ which in turn appointed an Intergovernmental Working Group in 1976 3/ to elaborate such a code of conduct.

2. The Group prepared a comprehensive draft of the code for consideration by the Commission on Transnational Corporations 4/. Similarly, other United Nations bodies or specialized agencies such as UNCTAD and ILO are engaged in detailed studies on aspectsof the regulation of transnational corporations falling within their respective fields of competence 5/. As part of an overall effort to obtain inputs into the formulation of the comprehensive code from the various UN regional commissions, the Economic Commission for Africa (ECA) and the UN Centre on Transnational Corporations (CTC) jointly organized an African Regional Meeting in January 1977 to enable African states to co-ordinate their views on the Code 6/. It would seem that the main result of that Seminar was to introduce participating African states to the immensity of the problems posed by TNCs.

3. The principal aim of this paper is to review the main issues involved in the elaboration of an international code of conduct from the African perspective. In view of the high degree of involvement of TNCs in the continent's major economic sectors, especially in mining and agriculture, the proposed Code has special significance for Africa; and it is important to sensitise African policy-makers to its ramifications. 7/

II. GENERAL NATURE, OBJECTIVES, AND COVERAGE OF THE CODE

a) The Nature and Objectives

4. A code can be considered as a systematic compilation and revision of existing laws, statutory as well as judicial, into a coherent whole with a view to harmonizing internal conflicts, supplying ommissions, and generally clarifying and completing the body of laws on the subject to which it relates. In respect of the projected code of conduct on TNCs, however, there is no body of relevant laws, global in application and dealing specifically with TNCs. In the present context a code of conduct simply refers to the ab initio formulation of a comprehensive and systematic set of international principles or rules seeking to regulate the behaviour of transnational corporations.

5. The proposed Code of Conduct is an example of international effort seeking to regulate foreign investment in host countries, whether the vehicle used for the investment is the transnational or any other type of foreign-controlled corporations. In all cases the broad purposes underlying such codes are similar. They may aim at ensuring that the activities of foreign-controlled corporations are consonant with the development objectives of host states, through the characterization of certain acts or patterns of behaviour as either illegal, inappropriate or unusual. They may attempt to harmonize national laws on such corporations by the adoption of internationally formulated model legislation; to establish common standards of behaviour among governments for the protection of the legitimate concerns of these corporations; and to make their regulation more effective through institutionalized intergovernmental co-operation. In the case of TNCs, it is the latter purpose which stands out as the most paramount.

6. The basic African perception is that TNCs are not just any kind of business enterprises, nor are they ordinary types of foreign-controlled companies. They are corporations whose very size, multinational spread and command over financial and managerial resources easily overwhelm the supervisory capabilities of any particular country; they are entities whose operations produce such significant impact on national development and on international relations as to warrant national and international scrutiny. The global context in which TNCs operate necessarily limit national and regional efforts at controlling or even monitoring their activities. The basis of this institutional contraint is that while each unit of a TNC network is nominally subject to the laws of the country or region in which it is established, no single authority can exercise control over the network as such and its global operations. Thus divergences in objectives between a TNC and a host state are exacerbated by differences in their respective powers and scope of operations. Moreover the location of decision-making centres outside their borders suggest that TNCs may foster a pattern of international division of labour which perpetuates political and economic dependence. 8/

7. Indeed, the proposed Code of Conduct has several antecedents, varying in scope, geographical application, coverage of subject-matter, and degrees of success9/. While most of these efforts at creating multilateral conventions for the regulation of foreign investments either achieved limited success or outright failure, these experiences do not prevent further and, in some cases, more ambitious efforts at formulating such codes.

8. The significant background to the task of the UN Intergovernmental working Group on a Code of Conduct on Transnational Corporations lay in the fact that all those earlier efforts had either been sponsored by private organizations, or conceived as subregional or regional in scope, or where the perspective was global, they touched upon the subjects of TNCs in a rather general way, or had covered only specific aspects of TNC activities. The work of this Working Group represents the first endeavour by the international community to create a universal instrument specifically dealing with the activities of TNCs in their totality.

(b) Scope and coverage

9. There are three aspects of the coverage of this Code of Conduct, namely, the objects of regulation, substantive coverage, and geographical coverage. A number of questions come up for consideration here: Whose behaviour is to be regulated by the Code? Who, in other words, should be its objects? Should the Code cover only TNCs or should it regulate TNCs as well as governments in their policies towards TNCs, covering such topics as rules for the proper treatment of TNCs, and intergovernmental collective action and co-operation in the regulation of TNCs? Secondly, should the Code be a truly comprehensive document covering all relevant topiccs in some detail? Should it be comprehensive in coverage but fairly general, anticipating further elaboration over time or by specialized international organizations such as ILO and UNCTAD? Alternatively, should the Code be limited initially in the coverage of subject matter, moving progressively towards a broader coverage later? Finally, should it cover only TNCs in the developing countries, or should it have global application?

10. The Code to be effective would have to be comprehensive in coverage and fairly detailed in respect of all areas except those that are being elaborated upon by the various specialized agencies and separate UN Working Groups and Committees. These latter areas could be dealt with in a fairly general manner, thus providing an umbrella text for the more elaborate related documents. Furthermore, the Code should to cover TNC activities in both developed and developing countries.

III. LEGAL NATURE OF THE CODE

(a) Mandatory or Voluntary Code of Conduct?

11. Among the number of issues that arise for consideration under this sub-heading, perhaps the most fundamental is the question whether the Code of Conduct should be mandatory or voluntary in nature. A fully mandatory Code would be one in which all norms directed at states as well as TNCs would be obligatory;whereas a fully voluntary code would mean that the application of all norms directed at states and TNCs would be entirely at their discretion.

12. The optimal position of a mandatory Code would include provisions regulating the conduct of TNCs, provisions on intergovernmental collective action and co-operation in the implementation of the Code, on the treatment of TNCs by governments, and on implementation of the Code, would be in the form of an international Convention. The provisions on implementation would include compulsory settlement of disputes between states in the application and interpretation of the Code. The detailed provisions regulating TNCs could even be drafted as a kind of uniform law or legislative model and annexed to the Convention so that the contracting states would enact the actual text into their national legal systems. 10/

13. The basic argument in favour of such a position is that only a fully binding Code can be sufficiently effective in curbing the power of TNCs, in that the contracting states would be under a legal obligation to implement its provisions. Moreover, if the relevant provisions of the Code were compiled into a uniform law and enacted in identical language in all states adopting the Code, it would ensure uniform interpretation or application of its provisions. As against this position, it is argued that the uniformity sought by such mandatory arrangements would be too rigid and stifling for states in widely differing situations, and that not enough is known about TNCs to warrant such detailed and compulsory regulation. Moreover, it would probably take far too long for states to go through their national constitutional procedures to give effect in their domestic law to any uniform law drawn up on the basis of the Code 11/.

14. Consequently, there are others who advocate the adoption of a voluntary code of conduct on TNCs. Some of the positive points in support of such a position are that it would be easier for states to reach agreement with respect to such a code; that, given the limited knowledge and experience in this area, the time is not yet ripe to adopt a mandatory code. It is further pointed out that a voluntary code, in spite of its non-binding nature, would still have considerable impact because its moral force could make it a set of guidelines for TNC behaviour and a source of policy for governments. This possiblity does not, however, impress the critics of a voluntary code who argue that governments and TNCs alike would not respect a code with is not binding. It is also pointed out that in the absence of a kind of uniform law, states which adopt certain principles of the code could nonetheless do so in a manner that would allow important divergencies in the laws and practices concerning TNCs 12/.

15. However, between the optimal voluntary and the optimal mandatory positions, there are a number of possible permutations tending either towards the basically voluntary or the basically mandatory approach. One such option is to have a code which is essentially voluntary but which contains some implementation responsibilities of a largely monitoring nature, entrusted to one or more international institutions. These could consist of a secretariat collecting and studying reports from contracting states on the Code's application and preparing studies based on such reports; as well as an International Committee charged with the preparation and adoption of revisions of the Code. Another intermediary position towards the mandatory approach, would be to have provisions on some areas in a mandatory form and those on other topics in a voluntary form.

16. Depending on whether its provisions are essentially mandatory or voluntary, a Code of Conduct might take the form of a convention, a declaration or a resolution. These are among the various forms of instruments used in international relations to express the consensus of states with varying degrees of authority, specificity and binding force.

17. A convention signifies a multilateral treaty signed by sovereign states and endowed with a formal binding force. There are basically two types of conventions: in one model, the states parties to the instrument undertake to give effect to it, but are given the discretion to select the precise manner in which the provisions of the convention are to be incorporated into their domestic legal system 13/. In the other type, the contracting parties are obliged to incorporate the provisions of the instrument more or less verbatim in their domestic law. In this manner, the legislative measures eventually adopted by each state party in the implementation of the convention would be virtually identical, except for variations that are anticipated by the convention itself 14//

18. In the case of Declaration, the instrument does not ordinarily have the formal legally obligatory status of a convention or other forms of treaties, although it may expressly be given such a status if the participating sovereign states so intend 15/. But a Declaration generally does no more than express in solemn manner the common intent of the states to pursue a common policy or ideal 16/. A Code of Conduct in this form will therefore, not have a binding legal force. Similarly, resolutions, which are the usual type of instruments adopted by international organizations, are generally no more than recommendations to governments. In that respect, they do not have the formal binding force of a convention, though they can if the parties so intend, require certain action from those to whom they are addressed.

19. The ideal form of a code for the African States would be a fully mandatory instrument containing provisions that are overwhelmingly favourable to them, in that, while enabling the international community to effectively control the activities of TNCs, the provisions do not stifle African national efforts to pursue their chosen socio-economic path. Nevertheless, taking into account the relatively weak bargaining position of African States vis-a-vis the home states of TNCs, and having regard to the possibility that a fully mandatory code would contain provisions which might be disadvantageous to Africa, it is probably more realistic to expect a code which would be mandatory in respect of certain subjects, and essentially voluntary in respect of others.

(b) One Code of Conduct or a Mixed Set of Codes?

20. The adoption of regulatory provisions on TNCs, some of which are mandatory while others are voluntary, does raise the issue whether it would be more feasible to have a single code of conduct or a a mixed form of a code, consisting of more than one instrument of differing binding force. As far as the Code is concerned, the problem ceases to exist if the provisions ultimately adopted are either mandatory or voluntary in their entirety. But it is quite probable that the alternative may prevail, in which case Africa would be confronted with the choice between a single UN Code of Conduct whose provisions are partly legally binding and partly voluntary, and at least two separate Codes of Conduct, one of which contains the mandatory provisions and the other, the voluntary prescriptions. The first choice, adopted in the form of a treaty consisting of provisions with varying binding force, does not present a logically neat proposition. The voluntary part would probably have to be drafted in such a manner as to give them the form of mandatory provisions but with so much built-in discretion as to render them voluntary in substance. On the other hand, the second choice introduces time element as a problem in that the coming into effect of the legally binding instrument is likely to take longer than that of the non-binding one, due to the domestic processes of approval and ratification.

21. The separate but complementary work being carried on by UNCTAD and ILO on other aspects of a Code of Conduct on TNCs makes the second option of two or more instruments a real one. Clearly, there is a degree of coincidence and convergence in the projected contents of these sectoral codes and the UN comprehensive one; while, at the same time several particular areas are covered by one code only. Thus, either these sectoral instruments are all ultimately enmeshed with the wider code to become a single code of conduct, or the comprehensive code becomes a sort of umbrella instrument which will make references to, or incorporate by reference, the sectoral codes while the latter maintain their separate identities. In either case, there seems to be the need to establish formal relationships between the global and the sectoral codes in order to avoid either extensive overlapping or the existence of considerable gaps in each of them 18/.

(c) Addressess of the Code

22. Irrespective of the final nature of the code of conduct, it is clear that the instrument(s) will contain three basic categoreis of provisions; those intended to regulate the conduct of TNCs, those stipulating certain rules for the treatment of TNCs by states, and those dealing with intergovernmental co-operation in ensuring the effective application of the code. The objects of the provisions i.e. those whose behaviour is sought to be regulated, would thus be TNCs on the one hand, and states and intergovernmental implementation organs on the other hand. The question which now arises for determination concerns the addressess or subjects of the code instruments, that is, the entity or entities to whom the prescriptions should be directly addressed.

23. Another practical question that arises in the case of the code of conduct is whether some or all of its provisions should be addressed to TNCs or to both of them 19/. In reality, the problem arises only in respect of those provisions that seek to regulate the conduct of TNCs. It is obvious that those provisions seeking to establish a standard of treatment of TNCs for states, and those dealing with principles of intergovernmental co-operation would have to be addressed to states.

24. The possibility of addressing to TNCs the provisions that seek to regulate their conduct is often frustrated on the grounds that TNCs, as corporate individuals, cannot be subjects of international law, There are actually two senses in which the term "subject of international law" is understood, and it is the failure to distinguish between these meanings that often leads to the assertion that individuals are not subjects of international legal rules 20/. The term may be used to refer simply to an addressee of international law, that is, an entity on whom international legal duties and liabilities, as well as rights, can be directly imposed or conferred. In the other sense of the term, we mean an international legal person, that is, an entity with the procedural capacity to sue and be sued before an international tribunal, and with the capacity to enter into contractual relations with other legal persons recognized by international law. It is in this latter sense that individuals are generally excluded from the subjects of international law.

25. In either sense of the term, however, individuals may be said to be subjects of international law. There are several instances in which rights as well as duties have been directly conferred or imposed on individuals, such as the rights of protection bestowed on slaves, 21/ the human rights of individuals recognized and made enforceable under certain conventions, 22/ and the criminal liabilities imposed on pirates, on war criminals after the Second World War, and on persons who commit the crime of genocide 23/.

26. It would seem, then, that the provisions of the code seeking to regulate the conduct of TNCs would be more appropriately addressed to contracting states, who should in turn take appropriate measures in their national legal systems to apply them to TNCs within their jurisdiction. Code provisions dealing with the treatment of TNCs by states, with the intergovernmental co-operative action, and with the establishment of implementation machinery would naturally be addressed to states.

IV. SUBSTANTIVE ISSUES TO BE COVERED BY CODE: APPRAISAL WITHIN THE AFRICAN CONTEXT

27. From discussions of the character of the Code and its provisions, one can now consider the substantive issues expected to be covered by it. The approach here would be to examine the nature of the problem posed by TNCs in a particular sphere of activity in terms of the social, political and economic concerns and developmental aspirations of Africa, within the following possible options and responses:

(a) The Lagos Plan of Action and the Code

28. The outcome of the negotiations leading to the possible adoption of a code of conduct on transnational corporations is yet to be known. Far less clear are its likely implications on the Lagos Plan of Action. It may fulfill the hopes and aspirations of African investee states;or it may turn out to be rather disappointing. However, it would seem useful, while awaiting the outcome, to direct our thoughts at some of the indices that could be used to appraise the substance of the instruments which ultimately emerge from the current negotiations.

29. The basic issues expected to inform the substance of the Code, as far as the African region is concerned, should be the host state's fundamental socio-economic and political imperatives within the framework of the Lagos Plan of Action. One definite way of arriving at these fundamentals is to examine the relevant economic and political declarations, resolutions, conventions and similar documents to which African states are parties, as well as national economic development plans and policy statements, in order to discover the direction of the vision, objectives and strategies of socio-economic development that have emerged as a sort of leitmotif in the perception of African political leaders and other policy makers.

30. There have been many such international instruments since 1960 - on the global level, among the developing countries as a distinct group, and with the African region itself 24/. A cursory look at the documents reveals certain basic aspirations and strategies, which can be summarized as follows:

(a) A rapid rate of self-sustaining or autonomous growth and diversification, and of capital accumulation and industrialization, so as to remove mass poverty and improve the living standards of the people, especially those living in the rural areas;

(b) Promotion of self-reliance at national and regional levels through the exercise of full and permanent sovereignty over natural resources, joint exploitation thereof, and integration of national markets;

(c) Reduction of income differentials between the urban and rural sectors and between the rich and the poor within each community;

(d) Attainment of an equitable income distribution pattern by increasing employment opportunities through greater use of labour-intensive techniques of production and creation of local resource-based industries;

(e) Increase in foreign exchange earnings through the expansion and diversification of exports (agricultural and manufactures), and a corresponding reduction of imports to improve the balance-of-payments; and

(f) Implementation of measures designed to assist the least developed, land-locked and island developing countries in overcoming the handicaps of their particular disabilities.

31. The substantive provisions of the Code of Conduct, in relation to the Lagos Plan of Action would be in the interest of Africa only to the extent that the resolution of the issues involved reflect and promote the above objectives and strategies. The substantive issues will now be discussed under four headings: regulations on the activities of transnational corporations; the treatment of the corporations by governments; and intergovernmental co-operation 25/. The manner in which the issues have been stated here, as well as the suggestions made for possible resolution thereof, are heavily influenced not only by our perception of Africa's general developmental concerns, but more concretely, by the findings of a number of recent case studies on TNC involvement in export-oriented primary commodities in selected African countries 26/.

(b) Obligations of Transnational Corporations

(i) Observance of Local Laws:

32. There is always a potential conflict of jurisdiction and loyalty between the host state of a TNC and its home state of third state, engendered by the possibility of extraterritorial application of laws in areas such as anti-trust, taxation, export controls, and technology transfers. The problem of extra-territoriality arises from the fact that although TNCs are creatures of national laws, and hence subject to the national jurisdiction of the state of incorporation, the impact of their activities transcends national boundaries, and they have related operations within their global structure which are located in other jurisdictions. Consequently, the invocation of the jurisdiction of other states becomes a real possibility, as different governments seek to reach one or more of the units of TNCs. On the other hand, extraterritorial application of laws of foreign states, and the preference by TNCs of the laws of their home states over those of their host states, undermine the sovereignty of the latter states.

33. Each contracting state might therefore undertake to adopt measures necessary for the enactment into its domestic legal system of provisions ensuring that affiliates, branches, or parent companies of TNCs, operating within its territory observe the laws of their host state, which could be designated the applicable law in respect of their activities. Contracting parties could also be made to refrain from extra-territorial application of their domestic legislation, unless its exercise is permitted under a bilateral or multilateral agreement.

(ii) Adherence to Economic Goals and Development Objectives:

34. TNCs undertake projects and pursue policies which are not necessarily in consonance with the development objectives of host states, especially in the areas of trade diversification, industrial and regional development, promotion of technical innovation and skill, and income policies. However, TNCs could contribute positively to development in conformity with the goals and objectives of the host state. This presupposes a great deal of autonomy for the branches or subsidiaries of TNCs; otherwise the enhancement of the objectives in each of the countries in which the TNCs affiliates operate would present difficulties in view of potential conflicts between the national priorities of the various countries concerned.

35. In addition, TNCs might undertake to establish within their financial capabilities and business purposes, effective forward and backward linkages with domestic enterprises in order to avoid the creation of foreign enclaves and to fully integrate their operations into the overall economic development efforts of host states.

(iii) Adherence to Socio-Cultural Objectives and Values of Host State:

36. Because the top management of TNC subsidiaries tend to be nationals of home state or other foreigners, and because TNCs are driven almost exclusively by the profit motive, they are prone to disrespect or ignore the socio-cultural values of host states in their business practices, and to introduce harmful consumption patterns into host states which can least afford them. There is no doubt whatsoever that some of these values, originating from traditional society, constitute a drag on rapid economic growth and on modernisation in general. Ordinarily, then one would advocate adherence to only those socio-cultural values which do not stand in the way of modernisation and efficiency. The problem, however, is that once we confer this sort of cultural eclecticism on TNCs, it might lead to a more general disrespect for the culture of the host state and might encourage TNCs to foster foreign ideas and cultural patterns which are in no sense necessary for economic development per se.

(iv) Respect for Human Rights and Fundamental Freedoms:

37. Some TNCs operate in countries such as South Africa which practice racist policies or otherwise violate fundamental human rights; in consequence, the corporations indirectly provide economic and political support for such regimes 27/. There are two alternative approaches that one can adopt towards such a situation. One could urge that TNCs operating in such countries should continue with their international organisations, and do everything else in their power to promote human rights and fundamental freedoms. This position, it should be pointed out, does not dispose of the argument that the very presence of these corporations strengthens the economy, and hence the political system of these countries. On the other hand, the advocates of this position are quick to point out that it is the foreign corporations that sustain the indigenous African population and the working classes, and that without them, these elements could not make a living.

(v) Non-Interference in Internal Political Affairs:

38. TNCs are known to have engaged in political intervention aimed at over-throwing unfriendly governments in some countries, or to have applied pressure of various forms in support of or against particular regimes. Some of them are also known to make illegal contributions to political parties or candidates for public office, or otherwise orchestrate the electoral process. All such practices are in conflict with the generally accepted principles of sovereignty and non-interference in the internal affairs of states by other states or their nationals 28/. Yet a pertinent question which arises here is whether there are any permissible public activities, such as certain forms of community or cultural activities, to which TNCs could properly contribute. This issue was raised by the Group of Eminent Persons in their Report without providing any definitive answer. The problem posed here is that if it is the ruling authority that is to determine the scope of permissible contributions, it could define it to serve its partisan advantage.

(vi) Non-Interference in Intergovernmental Relations:

39. There are two aspects to the interference of TNCs in intergovernmental relations. In the first case a TNC may enlist the support of its home state to exert pressure on the latter in resolving differences between it and the host state. In the second situation, the home state of the TNC attempts to use it as a vehicle for intervening in the internal affairs of the host state, or generally as an instrument of foreign policy of the home state.

40. The first situation finds a partial justification in international law, which grants to a state the right to protect its subjects when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels 29/

(viii) Ownership and Control:

41. There is universal acknowledgement of the right of all states to exercise full and permanent sovereignty over their natural resources and other forms of wealth 30/. This proposition amounts to an affirmation of ownership, which is associated not only with the right of possession, but also with control over the modalities for the use and disposal of such resources. Among the possible implications and consequences of the proposition are the right of a state to make rules relating to the authorisation, restrictions and prohibitions on the exploitation of resources within the state's frontiers; the creation of a framework for the eventual assumption of ownership or management of foreign-owned productive enterprises; and, in the absence of an amicable agreement as to the formula for participation or takeover, a resort to nationalisation. In Africa, the major means of production are still in the hands of foreign-based TNCs. Hence, there is a greater possibility of manipulating the continent's resources to frustrate development objectives.

42. Thus from an African point of view, the Code should reaffirm the right of every state to freely exercise full and permanent sovereignty over its natural resources and other forms of wealth, and over the manner of their exploitation. Such a right could be interpreted to include the right to control the inflow of foreign investment, to regulate the establishment and operations of foreign-owned enterprises in its territory, and to control such enterprises through participation in equity or management, or both.

(ix) Abstention From Corrupt Practices:

43. TNCs may indulge in various corrupt practices adversely affecting the balance-of-payments and tax revenues of host states and undermining the loyalty of public officials. Such practices include bribery of public officials (illicit payments), transfer pricing, illegal repatriation of profits and capital, tax evasion and misrepresentation of business information to government.

(x) Restrictive Business Practices:

44. TNCs often indulge in restrictive business practices ranging from restrictive clauses and transfer pricing in the interest of their global network; cartel marketing arrangements involving the sharing and controlling of specific markets; price fixing in domestic markets leading to the elimination of competitors or to inflationary consumer prices; various abuses of industrial property rights, such as transfer of technology at unreasonable prices, and unreasonable export restrictions in licensees; to a general orientation towards monopoly in production and marketing, including the control of raw materials and intermediary components by other firms. Such practices give rise to domination of key sectors of the host economy by TNCs, leading to political influences and manipulation, and to higher prices paid by consumers on account of decreased competition. 31/

(xi) Balance-of-payments and Financing:

45. The capital inflow into Africa from investment, as well as income from exports, do not often represent net savings in foreign exchange when juxtaposed to capital outflows in the form of payments for capital goods imported on the establishment of TNC productive enterprises, fees for technical services and management, research and development activities, repayment of loans, and repatriation of capital. These problems of capital outflow are compounded by transfer pricing 32/.

46. Consequently, TNCs could be called upon to endeavour to alleviate the balance-of payments problems of host states, by ensuring that their investment represents a net saving in foreign exchange through such policy measures as increasing local processing of commodities, profitable diversification and expansion of exports, reinvestment of profits in host states, and lesser dependence on foreign loans and a shift to greater equity capital as a source of financing projects.

(xii) Taxation:

47. TNCs are known to practise certain forms of tax fiddling related to transfer pricing, including underpricing of affilitate imports to reduce import duty liability; overpricing of such imports to reduce profits from particular operations and move them to more favourable tax jurisdiction, thereby affecting corporate tax receipts in the country of operation; inflation of expenses of visiting company executives and of head office expenses, and other inter-company payments. TNCs may also indulge in other forms of tax evasion and deliberate tax avoidance.

48. TNCs could therefore be made to abstain from business practices resulting in tax evasion and ill-motivated tax avoidance. They would make full and complete disclosure of their business transactions to enable the authorities to assess their true taxable base and thereby arrive at an equitable tax assessment in respect of them. The prescriptions on transfer pricing outlined above should also be made applicable under this heading. Furthermore, contracting states could undertake to negotiate bilateral and multilateral treaties and other arrangements aimed at institutionalizing the exchange of information on the profits, income and tax liabilities of TNCs as a vehicle for combatting tax evasion.

(xiii) Transfer of Technology:

49. TNCs dominate technology due to their large size,which make them centres of scientific and technical production; the large expenditure devoted to research and development activities; the organisation and production of technology on a global scale; and a systematic policy of process innovation 33/. TNCs tend to sell their technology at excessive costs and on other burdensome terms; for example, restrictive licensing agreements, and packaged technology deals seeking to tie up the sale of technology to investment capital and management. There is also the problem of the general inappropriateness of technology sold to the less developed countries in terms of their levels of development and possibilities of spill-overs into the local economy 34/. Then there is the centralisation and concentration of research and development activities outside the host states, thus denying them real opportunity to develop their national technological capabilities. All these factors lead to the weakening of the bargaining position of African countries in their technological needs, as well as a general dissatisfaction with the conditions under which technology is acquired from TNCs and its impact on their societies.

(xiv) Employment and Labour:

50. The contribution of TNCs to the generation of local employment is relatively insignificant due to their largely capital intensive production processes. Moreover, the level of responsibility of local employees tends to be unsatisfactory, since foreign TNC emplyees maintain control over engineering and management posts, leaving local people to fill production positions, middle and lower level supervisory positions, and middle-level marketing functions 35/. Quite often TNCs resist or resent host state's social welfare, health and employment policies and pursue anti-trade union practices.

51. The Code could therefore call on TNCs to endeavour to deploy technologies which generate greater employment both directly and indirectly. They could be made to institute training programmes for local workers to upgrade their employment levels and opportunities, taking into account the employment policies and long-term development objectives of the host state as well as of the enterprise. They could undertake to provide the best possible wages, social benefits, retirement provisions and working conditions within the framework of government policies; and disclose in the host state all safeguard measures and special working conditions which they observe in their home countries to protect the health and safety of workers 36/.

(xv) Consumer Protection:

52. The quality and safety of TNC products are often in question; and the prices may be much higher than similar products in the same or foreign market, without any justifiable reason for the price differentials. Moreover, sufficient information concerning the characteristics and attributes of products (e.g. through adequate labelling) is not generally furnished to consumers.

(xvi) Environmental Protection:

53. There is the need to protect the environment on health and aesthetic grounds; from this angle, industrial pollution and the perpetuation of mine pits are objectionable. There is also the need to protect the environment on economic grounds. The environment is part of a nation's natural resources, which should not be depleted needlessly. From this standpoint, practices such as deforestation and the maintenance of open mine pits in areas with agricultural potential are also indefensible. Moreover, TNCs often pay insufficient attention to the environment, and may in fact invest in particular host states simply because they are pollution havens with minimum standards of environmental protection.

(xvii) Accounting and Reporting Standards:

54. The collection, analysis and dissemination of information on TNCs are necessary for the evolution of effective mechanisms for striking fair bargains in negotiations leading to the establishment of projects. Subjects on which such information is very useful include the global organizational structure of a given TNC, its ownership pattern, financial structure, turnover, nature of the technology intended to be used in the proposed project, sales network, and such other information as would enable the national authorities to make rational choices between competing TNCs for a given project.

55. For the purpose of effective negotiations towards the establishment of TNC operations, their parent companies could therefore be made to provide information on their global organisational structure, marketing operations and technology which will enable the host country to make rational and responsible decisions on the project proposals. On the establishment of the project, TNCs could be made to provide to host states, on a regular basis, such accounting and other information on their operations as shall enable the authorities not only to arrive at a true assessment of their tax liabilities and the extent of financial outflows attributable to them, but also to formulate rational and realisitic government policies on international business operations in general 37/. TNCs could also undertake to provide the public and trade unions or other representatives of employees with such information as is reasonably required for the protection and defence of their interests.

(xviii) Contribution to Regional Integration:

56. One of the themes in current developmental literature is regional economic integration, which is of particular importance to Africa. Individual African States are generally handicapped in efforts at planned economic change and rapid development by the limited national resources available, small size of markets, lack of capital for large and efficient industrial complexes, and weak bargaining positions vis-a-vis foreign interests. Hence there is the real appreciation for a wider African regional economic grouping as an instrument for the major agricultural and industrial production required by a modern economy.

57. Ordinarily, TNCs should welcome efforts towards regional integration because of the opportunity it affords them for economies of scale in their production and for wider markets for their products. In practice, however, they are essentially interested in vertical and not horizontal integration, and may thus view economic integration merely as an opportunity to market affiliate company brands of products either manufactured abroad or assembled by the branch plants which are mere extensions of their production lines in Africa. Such an approach does not contribute significantly to the growth of technical skills or to real industrial development, since it merely utilises existing facilities in the particular area of economic grouping.

(c) Treatment of Transnational Corporation by Governments

(i) Repatriation of Dividends and Capital:

58. There is the general agreement that the timely transfer of income from investment capital and repatriation of capital in the event of disinvestment (whether voluntary or forcible) contributes immensely to a stable and equitable investment climate for foreign private direct investment. On the other hand the chronic balance-of-payments difficulties of host states and their requirements for essential goods and services for the population undercut their ability or willingness to repatriate such amounts promptly. There is clearly a need to balance the interest of the investee states with the legitimate claims of the investors.

(ii) Nationalisation and Compensation:

59. The assertion of the principle of permanent sovereignty over natural resources often stands in sharp conflict with the reluctance and even the refusal of TNCs to accept controls by host states over their operations, including arrangements for the progressive transfer of ownership to a host state or its nationals. If such a conflict remains unresolved over time, the state often takes to nationalisation as a last resort. Indeed, the developing countries generally regard nationalisation as a means of recovering their natural resources or transferring ownership of foreign-owned property to themselves, and also as a form of redistribution of the world's wealth.

60. International law generally recognises the right of a state to expropriate foreign private property as an expression of its sovereignty 38/. However, traditional notions of international law, especially as advanced by the Western capital-exporting nations, have always sought to impose severe limitations upon this right. In the traditional doctrine, the act of a state in depriving an alien of his property engages its international responsibility, and claims arising therefrom are international in character and may appropriately be adjudicated upon by international tribunals 39/. Furthermore, such a measure is proper under international law only if it is done for a public purpose, 40/ non-discriminatory in respect of aliens, and accompanied by just compensation, 41/ which is interpreted to mean "prompt, adequate and effective" compensation 42/. The rule that nationalisation gives rise to international responsibility is part of the substantive rules of the so-called minimum standards of international justice for aliens, which the capital-exporting countries seek to enforce through the practice of diplomatic protection of nationals abroad 43/

61. The traditional view of state responsibility relating to nationalisation is opposed by another doctrine, espoused largely by the Eastern European socialist states and many developing countries, which assert that it is the national law that determines the conditions for the law fulness of nationalisation, and that only the courts of the nationalising state have jurisdiction over any related claim. This arises from the concept of equality of treatment or national treatment, whichwhich is to the effect that no alien is entitled to a better treatment than a national of a host state, and that any preferential treatmentunder the rubric of minimum standards of international justice amounts to assigning aliens to a special regime in the state, thereby creating a state within a state 44/.

62. Moreover, the conditions imposed on the legality of nationalisation is stoutly; resisted 45/. In the first place, the "public purpose" limitation, understood not in the sense that the expropriated property must continue to be exploited or managed by a state-owned or state-controlled entity, but that the nationalising act itself must be shown to have been taken in the public interest, is rejected by many states. It is asserted that nationalisation as an expression of state sovereignty lies within the sole discretion of the state, taken on the basis of all circumstances which it considers pertinent and in conformity with its national constitution, laws and regulations, and not necessarily on the grounds of an objectively determined public interest 46/.

63. Equally controversial is the idea that payment of compensation is, as it were, part of the definition of a lawful nationalisation. Some states take the view that the absence of compensation does not render expropriation illegal, and that the measure remains lawful for all purposes, including transfer of title 47/. It is the nationalising state which should determine whether or not it is appropriate to pay compensation. On the whole, however, it is valid to say that most doctrine and much state practice associate compensation with nationalisation, even if the former is not admitted as a necessary ingredient of the latter.

64. As to the adequacy of compensation, several formulas have been advanced for its computation, reflecting differing notions of fairness or appropriateness 48/. The best known among these are the capitalised market value of the nationalised property, the replacement value, the depreciated book value, and the sales value of the real assets. The depreciated book value cannot be attacked in good conscience by the TNCs since it uses the very value officially and formally recorded by them in company books in their prior dealings with government authorities. The corporations cannot be heard to argue for one valuation for purposes of tax payments, and a different one for purposes of compensation.

(d) Intergovernmental Co-operation

65. The wide disparities and contradictions in the laws and policies of host states in respect of TNC operations afford them the option to establish themselves in inadequately protected states, thereby generating competition among potential host states and reinforcing the bargaining position of TNCs.

66. In addition to the general obligation to enact the substantive prescriptions contained in the Code into their national laws, contracting states could undertake to harmonize their laws and policies relating to TNCs through bilateral and other multilateral arrangements, particularly in the areas of preincorporation procedures, fiscal incentives, terms for the repatriation of profits and capital, and taxation, with a view to strengthening the bargaining position of host states. In the implementation of such policies of harmonisation, account should be taken of the differences in levels of development of the contracting states. There are other aspects of intergovernmental co-operation which relate to the machinery for the implementation of the Code, to which we now turn.

V. IMPLEMENTATION MACHINERY FOR THE CODE

67. Of crucial importance to the whole idea of a Code of Conduct is the machinery devised to ensure the implementation of its provisions. A partly or fully mandatory code that lacks an effective machinery for implementation is a self-defeating proposition.

(a) Exchange of Information, Clarification and Interpretation of the Code

68. The Code would require different levels of implementation; national, regional and interregional. The machinery at the national level is expected to induce, require or assess compliance by TNCs and governments with the provisions of the Code. At this level, each contracting state could undertake to enforce conscientiously the Code provisions, as enacted into its domestic law; and to make such modifications and amendments in existing relevant laws, including their companies code, as would give full force and effect to the Code of Conduct. Each contracting state could also agree to give reciprocal recognition to, and enforce the final decisions and similar measures by the courts and administrative tribunals of other states arising from the implementation of the Code.

69. Each contracting state could undertake to establish a National Committee charged with the collection, analysis and dissemination of information on TNC operations in its territory, including the extent of compliance with the provisions of the Code and relevant national laws. The Committee would *inter alia* advise Government agencies in negotiations with TNCs and also act as the focal point of contact with the subregional, regional and international agencies referred to below, particularly in the dissemination of information. In this connection, it is worthwhile noting the welcome development in the African region, where the ECA Conference of Ministers, by its Resolution 326 (XIII) adopted in Kinshasa in March 1977, urged each member State of ECA to establish a separate national unit to monitor the activities of TNCs within its territory and to deal with national and regional programmes arising therefrom. In March 1979, in Resolution 347(XIV), the Council of Ministers repeated its call on ECA member States to set up such units, suggesting the broadening of their functions to include advisory services to Governments, parastatal organisations and private enterprises in negotiations with TNCs 49/.

70. At the interregional level, CTC could be reorganised to serve as the Secretariat of the Commission on Transnational Corporations in the tasks assigned to the latter below. CTC could also be made responsible for the dissemination of information on TNCs on an interregional basis, the monitoring of the implementation of the Code provisions at the national and regional levels, liaison with the National Committees and the Joint Units on TNCs, and servicing the Panel of Experts dealt with immediately below 50/.

(b) Arbitration and Settlement of Disputes

71. On the supposition that the Code when eventually adopted will assume a partially or fully mandatory form, the need for dispute-settlement schemes would involve sovereign states who are the contracting parties. Disputes with TNCs would be the normal occasion on which the dispute settlement machinery would be invoked. Here there are several possibilities, moving at different levels of compulsion.

72. The States could jointly establish an International Panel of Experts to be charged with inquiry (consultation) and conciliation between the states parties to a dispute 51/. Under the procedure for inquiry or consultation, there could be either a voluntary or compulsory submission of a dispute to a Panel, drawn from the same list as the Panel of Experts on Interpretation and Clarification, with power to determine the law and facts in respect of particular disputes or cases, but without the power to issue decisions or judgements. Under conciliation, there could be either voluntary or compulsory submission to a Panel, with power to issue decisions in respect of particular disputes referred to it, accompanied by the freedom of the parties to reject or accept the decision.

73. Groups of countries could also institute Panels of Experts for Arbitration or settlement of disputes. Here, one could have either a voluntary or compulsory submission of disputes to the Panel, chosen by the parties directly or under an agreed procedure and applying such rules of law and procedure are agreed upon by the parties, with power to make binding decisions or awards in respect of particular disputes referred to it. Finally, the Code could establish a procedure for a voluntary or compulsory recourse to a permanent and regularly-staffed machinery, applying generally established rules of law and procedure, with power to make binding decisions in respect of particular disputes referred to it. An example of this is the International Court of Justice.

74. Doubts and controversies arising from the contract are to be exclusively decided by the competent tribunals of the state in conformity with its laws and shall not give rise to foreign diplomatic intervention under any circumstances. This principle is an extension of the doctrine of national treatment and purports to designate the alien natural or juridical person as a national of the host state for the purposes of the contract 52/. It constitutes the most logical complement to the demand for the observance of local laws, since it would vest both the applicable law and the proper forum in the host state.

75. But provided there is no such procedural incapacity, it seems plausible to subject any dispute as to the interpretation, application or implementation of the Code, or any contract entered into on the basis of the Code, to the exclusive jurisdication of the host state, unless the parties have mutually agreed to its submission to particular procedures of an international forum either before or at the time of the occurrence of such dispute. In the event of such an agreement, the parties could utilise the procedures and facilities of the International Centre for the Settlement of Disputes, 53/ or of the International Chamber of Commerce 54/.

76. In addition to relevant and effective dispute-settlement schemes, we should not lose sight of the necessity for a permanent machinery charged with the overall responsibility for the supervision and successful implementation of the Code. In this regard, the United Nations Commission on Transnational Corporations could be entrusted with policy-making and supervisory powers over the Centre on Transnational Corporations in the secretarial functions assigned to the latter, subject to the general directives of the United Nations Economic and Social Council. The Commission could also be assigned the responsibility of making recommendations for the resolution of problems arising from the implementation of the Code, and for possible revisions thereof, to ECOSOC, which would in turn draw the attention of the contracting states to such recommendations for appropriate action.

SUMMARY OF CONCLUSIONS

77. The proposed international code of conduct is expected to have provisions calling upon TNCs to scrupulously observe local laws of the host country; to adhere to its economic goals and development objectives; to refrain from inteference in internal affairs and in intergovernmental relations; to adhere to the socio-cultural objectives and values of host country; and to respect human rights and fundamental freedoms. In the economic, financial and social fields, we expect the Code, inter alia to affirm the right to ownership or control of TNCs as an exercise in the full and permanent sovereignty over natural resources. There should be provisions calling upon TNCs to abstain from corrupt practices and unfair restrictive business practices, including transfer pricing;to avoid policies that worsen the balance-of-payments of host states; to desist from tax evasion and avoidance; to transfer appropriate technology at reasonable prices; to adopt employment and labour policies that enhance the job opportunities and technical skills of indigenous workers; and to disclose more information on their worldwide organisational structure, operations and accounting methods.

78. Concerning the treatment of TNCs by Governments, it is hoped that any provisions on the obligation of governments to transfer dividends and repatriate capital in the event of disinvestment will take cognizance of the right of the host state to postpone timely transfers which would aggravate its balance-of-payments problems. Host states may acknowledge the right of investors to demand compensation in the event of nationalisation; but this would only be in respect of appropriate compensation, possibly based on the depreciated book value of the nationalised assets. In respect of implementation of the Code, we have explained that this would require structures at the national, regional and interregional levels to take care of its different aspects. There would be the need for structures concerned with exchange of information, clarification and interpretation of the Code; and there would be dispute-settlement organs at various levels.

79. Whatever the legal nature and the substantive provisions of the Code might eventually be negotiated, there seems to be a general concern that it should be effective. Effectiveness in this context is understood to refer to the extent of its actual impact on those entities whose behaviour is expected to be regulated by it.

80. Of equal relevance to this consideration is the effectiveness of the machinery for implementation of the Code provisions, including the monitoring agencies and the nature of the sanctions established. Above all, what would be most crucial in predicting the effectiveness of the Code of Conduct on Transnational Corporations are the real intentions of the contracting states, namely, the extent to which they are truly committed to its stated objectives. Indeed, it is from the angel of the Code's effectiveness, as well as the extent to which its proposed provisions satisfy the indices for appraisal already outlined in this paper, that African states should view the current negotiations leading to the possible adoption of the Code.

F O O T N O T E S

1. The Group of Eminent Persons was appointed under the authority of ECOSOC Resolution 1721 (LIII) of 1972. Their report issued in 1974, is entitled "The Impact of Multinational Corporations on Development and On International Relations" (UN:E/5500/Rev.1).

2. Under ECOSOC Resolution 1913 (LVII), December 1974; The Commission is an Intergovernmental Subsidiary Body of ECOSOC.

3. At its Second Session in Lima in March 1976. The Working Group had its First Session in January 1977 and its latest Session (the Tenth) in May 1980.

4. See Report of the Intergovernmental Working Group on a Code of Conduct on its fifteenth, sixteenth and seventeenth sessions (E/C.10/1982/6), 5 June 1982.

5. See for instance (1) UNCTAD, Draft International Code of Conduct on the Transfer of Technology; (2) ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; (3) UNCTAD, Principles and Rules on Restrictive Business Practices; (4) The International Code on Marketing of Breast-milk substitutes; (5) International standards of Reporting and Accounting; and (6) UNCTAD, International Agreement on Illicit Payments.

6. Report of the African Regional Meeting on a Code of Conduct for Transnational Corporations (E/CN.14/674, February 1977).

7. See also ECA, Transnational Corporations in Africa: Some Major Issues (E/CN.14/703); UNCTC, Multinational Corporations in World Development (ST/ECA/190); and UNCTC, Transnational Corporations in World Development: A Re-examination (E/C.10/38).

8. See generally: "The Impact of Multinational Corporations on Development and on International Relations," op.cit.; UN, Multinational Corporations in World Development, (1973 ST/ECA/190); UN, Transnational Corporations in World Development: A Re-examination (1978 E/C 10/38); Raymond Vernon, Sovereignty at Bay (London: Longman Group Ltd. 1971).

9. On the global level, see the draft International Convention on the Treatment of Foreigners, 1928 (League of Nations); draft Havana Charter on International Trade Organization, 1948; ICC Model International Code of Fair Treatment for Foreign Investments, 1949; the draft Abs/Shawcross Convention on Investments Abroad, 1959; the draft Harvard Law School Convention on the International Responsibility for Injuries to Aliens, 1961.

On regional levels, we have the examples of the draft Economic Agreement of Bogota (1948), the draft General Inter-American Economic Agreement (1957), the Andean Foreign Investment Code (1970), the OECD Guidelines for Multinational Enterprises (1976), the Treaty Establishing a Customs and Economic Union of Central Africa (ULDAC) (1964), Convention on Investments in the States of UDEAC (1965), the Treaty for East African Co-operation (1967), and the Treaty of the Economic Community of West African States (ECOWAS, (1975).

10. UN, "Transnational Corporations: Certain Modalities for Implementation of a Code of Conduct in Relation to Its Possible Legal Nature". (E/C/10/AC.2/9, December 1978).

11. Ibid, pp.34.

12. Ibid, pp.27.

13. An example is the Convention on a Code of Conduct for Liner Conferences of 1974. (UNCTAD:TD/CODE/11/Rev.1, and Annex 1).

14. See, for example, the Hague Convention Relating to a Uniform Law on the International Sale of Goods, 1964.

15. Eg. The Declaration of Paris, 1856.

16. Eg. Universal Declaration of Human Rights, 1948.

17. A Resolution may combine the characteristics of a Declaration and a recommendation. The principles involved may be declared as being appropriate or desirable, and are then recommended to the relevant actors for adoption and compliance.

18. This is especially true of the UN comprehensive code of conduct, which aims at covering as many activities of TNCs as possible.

19. Provisions addressed to TNCs would be of the type: "Transnational Corporations shall do this or that" or "shall not do this or that". Those addressed to states would be of the sort: "States shall do this or that" or "States shall not do this or that"; or "Shall take all measures necessary to ensure that TNCs do this or that or do not do this or that".

20. J.G. Starke, Introduction to International Law (London: Butterworths, 6th Edition, 1967, pp.54, Max Sorensen (ed.) Manual of Public International Law (Lusaka: National Educational Company of Zambia, 1968, pp. 249-250).

21. Eg. Geneva Convention on the High Seas, 1958.

22. International Covenant on Economic, Social and Cultural Rights, 1966; International Covenant on Civil and Political Rights, 1966; International Convention on the Elimination of all forms of Racial Discrimination, 1965; the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

23. See Agreement Between U.S., France, U.K. and Soviet Union for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, 1945.

- Convention on the Prevention and Punishment of the Crime of Genocide, 1951.

See also Advisory Opinion on the Jurisdiction of the Courts of Dawig, PCIJ (1928) Series B, No. 15, which acknowledges the right of states to bestow rights and impose duties upon individuals through treaties.

24. The important declarations in this area include the following:

- The Lagos Plan of Action
- General Assembly Resolution on Concreted Action for Economic Development of Economically Less Developed Countries (Res.1515 (XV), 1960)
- Resolution on Permanent Sovereignty Over Natural Resources (Res. 3171 (XXVIII) December 1973).
- International Development Strategy for the Second United Nations Development Decade (Res.2626 (XXV) October 1970)
- Declaration on the Establishment of a New International Economic Order (Res. 3201 (S-VI), May 1974); Programme of Action on the Establishment of a New International Economic Order (Res.3202 (S-VI).
- Charter of Economic Rights and Duties of States (Res. 3281 (XXIX) December 1974)
- Lima Declaration and Plan of Action on Industrial Development and Co-operation (UNIDO Doc. ID/B/155/Add.1, April 1975)
- Arusha Declaration for Collective Self-reliance and Framework for Negotiations, (UNCTAD: TD/236, February 1979)

25. The nature of the general problems posed by the activities of TNCs has been outlined at greater length in a number of UN and other publications.

Some of the major issues as they relate specifically to Africa have also been stated more amply in "Transnational Corporations in Africa: Some Major Issues"" (ECA: E/CN.14/703, 16 March 1979).

26. These studies, carried out under the drrection of the Joint ECA/UNCTC Unit on Transnational Corporations, form part of interregional Studies conducted in Africa, Asia and Latin America.

27. UNCTC, reports on the activities of transnational corporations in Southern Africa (E/C.10/26; E/C.10/39; E/C.10/83; ST/CTC/12; E/C.10/1982/11) which analyse these issues in greater detail.

28. See also R. Venon, Sovereignty at Bay, New York, Basic Books, 1977

29. This is the approach adopted by the EEC in its Code of Conduct for South Africa, adopted in September 1977 by the Council of Ministers.

30. United Nations, Permanent Sovereignty over Natural Resources, (E/C.7/53) of 31 January 1975; and United Nations General Assembly resolutions 1515(XV) of December 1960 and 1803(XVII) of December 1962.

31. See also UNCTAD, Principles and Rules on Restrictive Business Practices (by Colin Greenhill).

32. ECA, "Transnational Corporations and the Excessive Outflow of Financial Resources from the Developing African Countries" (Working Paper No.3, Joint ECA/CTNC Unit on TNCs, September, 1979). Anglais Seult.

33. See UNCTAD, Draft International Code of Conduct on the Transter of Technology (TD/CODE/TOT/25) and UNCTAD, Negotiations of an International Code of Conduct on the Transfer of Technology (TD/CODE TOT/27).

34. UNCTC, Technology Transfer Through Transnational Corporations (ST/CTC/II) pp. 16-22.

35. See relevant chapter on ILO's Report on World Employment Conference, June 1976.

36. The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (by Hans Gunter).

37. See reports of the Ad Hoc Intergovernmental Working Group of Experts on International Standards of Reporting and Accounting. This Group was established in 1979 by ECOSOC resolution 1979/44.

38. Anglo-Iranian Oil Case (1956) ICJ Rep. 36

39. Marguerite de Joly de Sabla Case (United States V. Panama), American and Panamanian General Claims Arbitration, 1933 (6 United Nations Report of International Arbitral Awards, 358, 366).

40. Norwegian Shipowers Case (Norway v United States), 1922 (1 United Nations Report of International Arbitral Awards), 309. See also decision of the Supreme Court of Aden in Anglo-Iranian Oil Co. Ltd. v. Jaffrate (1953). 1 WLR 246.

41. Oscar Chinn Case (United Kingdom v. Belgium) PCIJ Ser. A/B No. 63; Norwegian Shipowers Case (op. cit. fotnote 30).

42. See generally, R. Lillich, The Valuation of Nationalised Property Under International Law (1975).

"Promptness" refers to the speed with which compensation is paid; "adequacy" relates to the quantum of payment; and "effectiveness" refers to the transferability or convertibility of the compensation paid.

43. See A. Roth, Minimum Standards of International Law Applied to Aliens (1949); E. Borchard, "The Minimum Standard of Treatment of Aliens", 38 Michigan L. Review 445 (1940).

44. This view was eloquently expressed by the 19th century Argentinian Foreign Minister, Carlos Calvo, in 1892. See also C. Calvo, Le Droit International. (1885 5th Edition) pp. 231.

For recent affirmation of this position, See Latin American Resolution presented in October 1972 at the 12th Session of the UNCTAD Trade and Development Board in the Course of the debate over the Chilean Kennecott nationalisation Case. (UNCTAD: TD/B/SR. 330; TD/B/421 Annex iii).

45. For an account of the progressive development in the new trends, see A.O. Adede, "International Law and the Property of Aliens: The Old Order Changeth." Malaya Law Review, Vol. 19, No.1, July 1977, pp. 175-193.

46. See the Latin American Resolution at the UNCTAD meeting in 1972, op. cit. footnote 34. See also UNCTAD Resolution 88 (XIII), 1972; Charter of Economic Rights and Duties of States, 1974, Art 2 /GA Resolution 3281 (XXIX)/.

47. See decision of the Bremen District Court of 1959 concerning the Indonesian legislation of 1958 nationalising Dutch Enterprises, reported by Domke in American Journal of International Law (1960) Vol. 54 at pp. 306-307, 312-315. Also, the case of In Re Claim by Herbert Wagg and Co. Ltd. (1956) Ch. 323,

48. Norman Girvan, "The Question of Compensation: A Third World Perspective" Vanderbilt Journal of Transnational Law (Spring, 1972)

49. By way of technical assistance to the member States in the establishment of the national units, the ECA Secretariat has put out a paper entitled: "Operational Guidelines for the Establishment of National Units for Co-ordinating Government Policies Relating to Transnational Corporations in Africa" E/CN.14/CTNC/4, 28 November 1979.

50. Precedents for a secretariat with information and servicing functions are to be found in the Convention on a Code of Conduct for Liner Conferences, 1974 (UNCTAD: TD/CODE/11/Rev.1 Annex 1, Art. 46); and the International Development Strategy for the Second United Nations Development Decade, Section D.

51. Precedents for such a Panel are to be found in the OECD Guidelines for Multi-national Enterprises, the General Agreement on Tariffs and Trade, the ILO Convention, the United Nations Human Rights Commission;

52. Max Sorensen, op. cit. pp. 590-591.

J.G. Starke, Introduction to International Law, op. cit. pp. 259-261.

North American Dredging Company Case, (United States v. Mexico), Annual Digest of Public International Law Cases, 1925-1926, No. 218.

The validity of this clause is often challenged on the grounds that a private individual has no right to renounce the right of his government to protect him abroad and to see to it that the dignity of the state does not suffer from injury through the violence done to its nationals. In response to this argument, it is pointed out that what the alien is waving is not the state's right of diplomatic protection over its nationals, but his own power to

request the exercise of that right in his favour. It would seem from the decided cases that so long as the waiver is applicable only to matters connected with the contract, the clause is regarded as valid in international law.

53. The Centre (ICSID) was set up under a 1965 Convention under the auspices of the World Bank to provide for settlement of international investment disputes between a contracting state and nationals of another contracting state on a voluntary basis and in accordance with the rules laid down in the Convention. The Centre itself does not act as arbitrator or conciliator, but simply maintains a panel of qualified persons from whom conciliators and arbitrators are selected by the parties, and also provides the necessary facilities for the conduct of the proceedings.

54. ICC has a Court of Arbitration which administers a code of rules especially adapted to the settlement of international trade or commercial disputes. Arbitration is open to members and non-members alike.